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No. 86-550

IN THE SUPREME COURT OF THE
UNITED STATES

October Term, 1986

Thomas G. Beckham,

Petitioner

v.

The Sun News and the Sun Publishing Company,

Respondents.

On Appeal from the Supreme Court of South Carolina

Brief in Opposition to Petition for Certiorari

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Argument

I. **The only federal issue involved in the decision from which review is sought has been decisively addressed by this Court.**

Petitioner frames the question presented by his Petition for Writ of Certiorari as raising the constitutional question of whether a libel defendant has the right to plead and prove truth in defending an action brought by a public official. Petitioner correctly states that he has the burden of proving that the publication was false but apparently believes that it would somehow be consistent with the placement of

that burden to also place on a defendant a burden to prove truth.

As recognized by the South Carolina Supreme Court in its decision the First Amendment issues raised by this case have been clearly established by this Court. Petitioner is a public official and as such has the burden, established in New York Times v. Sullivan, 376 U.S. 254 (1964), of showing that the statement complained of

> was made with actual malice--that is, with knowledge that it was false or with reckless disregard of whether it was false or not.

New York Times, at 279-280. The burden imposed by New York Times includes the requirement that a public official show the falsity of the allegedly defamatory statement. See Garrison v. Louisiana, 379 U.S. 64 (1964), and Herbert v. Lando, 441 U.S. 153 (1979).

This subject was most recently discussed by this Court in Philadelphia Newspapers v. Hepps, 475 U.S. ___, 89 L.Ed.2d 783, 106

S.Ct. ___, (1986), a case having particular relevance to the Petition before the Court. In that case a private figure brought a defamation action against a media defendant in state court in Pennsylvania. Under the applicable Pennsylvania statute the burden of proving the defense of truth was on the defendant. The trial court refused to charge this statute, holding that it violated the Federal Constitution. On appeal to the Pennsylvania Supreme Court this holding was reversed, that court holding that placing the burden of proving truth on the defendant did not unconstitutionally inhibit free debate.

On certiorari to this Court the holding of the Pennsylvania Supreme Court was reversed:

> Here, as in Gertz, the plaintiff is a private figure and the newspaper articles are of public concern. In Gertz as in New York Times, the common-law rule was superseded by a constitutional rule. We believe that the common law's rule on falsity--that the defendant must bear the burden of proving

> truth--must similarly fall here to a constitutional requirement that the plaintiff bear the burden of showing falsity, as well as fault, before recovering damages.

Philadelphia Newspapers, 89 L.Ed.2d at 792. Thus private as well as public figures must carry the burden of proving falsity when suing media defendants and it is an unconstitutional infringement of the rights of free speech and free press to require media defendants to carry the burden of proving truth.

The Petitioner in the case before the Court was a police officer who was fired from the Police Department where he worked for supplying false sworn affidavits to obtain the issuance of arrest warrants for alleged drug dealers. The news article published by the Respondent on which this action is based concerned Petitioner's firing. Thus this case involves a public official bringing a libel action against a media defendant for a publication on a

matter of legitimate public interest. These factors require the most stringent protection of the rights of free speech and free press and preclude any placement on the Respondent of a burden of proving truth. The decisions of this Court make it extremely clear that Petitioner has the burden of proving falsity and that it would be error to require Respondent to carry the burden of proving truth. In so holding the decision of the Supreme Court of South Carolina followed established precedent of this Court and did not decide an important question of federal law which has not been settled by this Court.

II. The decision from which review is sought is based upon state law and thus did not decide an important question of federal law.

Petitioner's belief that it would be both constitutional and consistent to place a burden of proving falsity on a libel plaintiff and a burden of proving truth on the defendant apparently arises from a

misunderstanding of South Carolina case law on the defense of truth and specifically the doctrine of "substantial turth." This term first appeared in a South Carolina libel case in Dauterman v. State-Record Co., 249 S.C. 512, 154 S.E.2d 919 (1967) which involved a claim that a newspaper article had defamed the plaintiff by stating that he had been drinking "quite a bit."

> Under all of the circumstances reflected by the record, we think that the circuit judge correctly concluded that the language complained of was not actionable, but, even if the statement as to the appellant "drinking 'quite a bit' Monday" be considered libelous, the record reflects that such statement was substantially true.

Dauterman, at 514, (emphasis supplied).

The South Carolina Supreme Court elaborated on this aspect of the defense of truth in Ross v. Columbia Newspapers, 266 S.C. 81, 221 S.E.2d 770 (1976):

> [t]he truth of the matter published is, of course, a complete defense to an action based on defamation, 50 Am.Jur.(2d) Libel and Slander §179 (1970). And, we have held that a sufficient defense is made out where the evidence establishes that the statement was substantially true. Dauterman v. State-Record Co.

Ross, at 80. These cases have established that in South Carolina the defense of truth requires only a showing of "substantial truth." Substantial truth relates to the degree of accuracy required and allows a defendant to make technical errors in its publication without losing the protection of the defense. In terms of the libel law of South Carolina a publication cannot be both false and substantially true.

Petitioner has apparently misapprehended this relationship. He acknowledges that it was appropriate to place the burden of proving falsity on him and argues that he met that burden. He then argues that it is appropriate to place on the defendant the

burden of proving the defense of substantial truth. This argument ignores the fact that under South Carolina law the publication was either false or substantially true and that only one party can bear the burden of proof on the issue. The South Carolina Supreme Court did not, however ignore this proposition, holding that

> the trial judge properly charged the jury that the plaintiff had the burden of proving falsity. However, he also charged the jury that truth was a defense as to which the defendant had the burden of proof. We agree with the Sun News that this improper charge was necessarily confusing to the jury.

(App. A. 7a). Thus the court held that as a matter of state libel law it is completely inconsistent to charge that both parties have the burden of proof on the same issue. This holding is what was decided in the opinion which Petitioner seeks to have reviewed. He does not

contest the placement of the burden of proving falsity on him. Instead he argues that the burden of proving truth should have been placed on the defendant. The Supreme Court of South Carolina held that such a placement of dual burdens on the same issue would be inconsistent and confusing as a matter of state law. That holding did not decide any important federal question which should be settled by this Court.

Conclusion

It is respectfully submitted that Petitioner has failed to establish under Rule 17 that there are special and important reasons why the writ of certiorari should be granted. The only federal issue involved in the case has been fully decided by this Court and was correctly followed by the Supreme Court of

South Carolina. The only issues which can be said to have been decided by that court were issues of state law.

Respectfully submitted,

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